

Rationale for Non-Significance

Office: Office of Water/Office of Wetlands, Oceans, and Watersheds

Title: Codifying EPA's Adjudicatory Decision on Florida's Clean Water Act Section 404 Program Request

SAN: Not yet assigned.

Stage: Final

Description of the Action: Section 404 of the Clean Water Act (CWA) authorizes the Secretary of the Army, acting through the Chief of Engineers of the Corps, to issue permits for the discharge of dredged or fill material into waters of the United States. CWA Section 404(g) allows a state or tribe to submit to the U.S. Environmental Protection Agency (EPA) a request to assume administration of the CWA Section 404 program in certain waters within the state's or tribe's jurisdiction. Currently, two states (Michigan and New Jersey) have assumed the CWA Section 404 program, and the list of those states with their applicable authorities related to that assumption are listed in 40 CFR Part 233 Subpart H, titled "Approved State Programs." On August 20, 2020, EPA received from the Governor of the State of Florida a complete program submission for regulating discharges of dredged or fill material into waters within the jurisdiction of the State in accordance with CWA Section 404(g)(1). Should EPA approve Florida's request to assume the Section 404 permitting program, EPA intends to add Florida to the list of approved state programs under 40 CFR Part 233 Subpart H. EPA has determined that the ministerial addition of Florida to 40 CFR Part 233 Subpart H, along with the applicable state authorities, is non-significant.

Background: On August 20, 2020, EPA received from the Governor of the State of Florida a complete program submission for regulating discharges of dredged or fill materials into waters within the jurisdiction of the State in accordance with CWA Section 404(g)(1). The program approval itself was subject to notice and comment through a notice published in the Federal Register on September 16, 2020. OMB did not review that non-rulemaking notice under Executive Order 12866, which generated over 3,000 public comments considered by the Agency. EPA must approve or disapprove Florida's program by December 17, 2020, consistent with CWA Section 404 and the Agency's implementing regulations. If EPA approves Florida's assumption of the CWA Section 404 program, the Agency will also modify 40 CFR Part 233 to add Florida and its associated authorities to Subpart H. To be clear, EPA's decision on approval of Florida's assumption of the CWA Section 404 program is not the subject of EPA's non-significance determination in this action memo, but rather this non-significance determination applies only to the ministerial addition of Florida to the current list of approved states, along with the applicable state authorities.

Waiver of Section 3(c) of Executive Order 13771: This action was not included in the most recent publication of the Reg Agenda. Therefore, as part of the Executive Order 12866 non-significance determination, EPA is also requesting a waiver under Executive Order 13771, Section 3(c). EPA did not include this action in the most recent Reg Agenda because:

- This final rule action is contingent on EPA approving Florida's program, and the Agency could not pre-judge the outcome of its review by including the final rule in the most recent Regulatory Agenda.

Rationale to Support a Non-Significant Determination: If EPA approves Florida's Section 404 program, this final rule would make an administrative change to update 40 CFR Part 233 simply to reflect EPA's approval of Florida's Section 404 program. Section 553(b)(B) of the Administrative Procedure Act, 5 U.S.C. § 553(b)(B), provides that, when an agency for good cause finds that public notice and comment procedures are impracticable, unnecessary, or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. EPA has determined that there is good cause for issuing this rule final without an opportunity for public comment because it is unnecessary. This is because this regulatory update simply applies to the procedural act of adding Florida to the list of approved states in 40 CFR Part 233 Subpart H, along with the applicable state authorities. Importantly, under 40 CFR 233.15(h), EPA must issue a Federal Register notice of the Agency's approval or disapproval of Florida's Section 404 program, and EPA's program approval decision has been subject to public notice and comment and extensive stakeholder engagement. The same is true for Florida's underlying state program application. With the final rule subject to this memo, EPA would simply codify its notice of approval of Florida's program in the Code of Federal Regulations to ensure its approval is accessible to members of the public. Because the State's request for program approval was already subject to notice and comment, notice and comment on a codification of the approval is unnecessary.

This action does not impose any burdens or costs. It would simply provide transparency and assist with compliance by informing members of the public, including potential permit applicants and other stakeholders, that Florida is the Section 404 permitting authority for certain waters of the United States.

Costs: None.

Timing: EPA must make a decision on whether to approve or disapprove Florida's CWA Section 404 program by December 17, 2020, consistent with CWA Section 404 and EPA's implementing regulations. EPA will issue a Federal Register notice to approve or disapprove the program, and an approved program would become effective upon publication of that notice in the Federal Register. In the interest of transparency and consistency with any notice of approval, should EPA approve Florida's program, this final rule to update the regulatory text of 40 CFR Part 233 should be signed by **December 17, 2020**.

Rationale for Non-Significance Determination for the Final Rule Codifying EPA's Adjudicatory Decision on Florida's Clean Water Act Section 404 Program Request

Approved:

DAVID
ROSS

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David P. Ross,
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Disapproved with comments: